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No. 82-1880

In the Supreme Court of the United States

OCTOBER TERM, 1982

NORRIS INDUSTRIES, INC.
Petitioner,

v.

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION
and
DAVID L. LADD, REGISTER OF COPYRIGHTS
Respondents.

PETITIONER'S REPLY BRIEF TO BRIEFS OF RESPONDENTS IN OPPOSITION

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Petitioner, Norris Industries, Inc., respectfully submits this Reply Brief in order to respond to certain matters raised by Respondents International Telephone And Telegraph Corporation and David L. Ladd, Register of Copyrights¹, in their respective briefs in opposition to Norris' Petition For A Writ of Certiorari.

¹ Petitioner Norris Industries, Inc. is referred to hereinafter as "Norris". Respondents, International Telephone And Telegraph Corporation, and David L. Ladd, Register of Copyrights, are referred to hereinafter as "ITT" and the "Copyright Office", respectively. References to ITT's Brief In Opposition will be as follows: (ITT Br. p. __). References to the Solicitor General's Brief In Opposition on behalf of the Copyright Office will be as follows: (S.G. Br. p. __). References to the Record will be by way of the following citation: (Vol. __, p. __).

47 L.Ed. 460 (1903), '[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . .' Neither the Constitution nor the Copyright Act authorizes the Copyright Office or the federal judiciary to serve as arbiters of national taste. These officials have no particular competence to assess the merits of one genre of art relative to another. And to allow them to assume such authority would be to risk stultifying the creativity and originality the copyright laws were expressly designed to encourage. *Id.* at 251-52, 23 S.Ct. 298; accord, *Mazer v. Stein*, *supra* at 214, 79 S.Ct. 141.'" 591 F.2d at 805.

The danger warned against in *Esquire* is exemplified by the Eleventh Circuit's refusal even to consider *actual evidence* submitted by Norris to the Copyright Office and in the District Court in support of the copyrightability of its Trim. The most telling example of this evil is shown by the fact that the appellate court completely ignored highly relevant and probative evidence of the *conceptual separability* of the spoke pattern of Norris' Ornamental Trim from any *supposed* utilitarian aspects of the Trim. In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2nd Cir. 1980), the Second Circuit found conceptually separable sculptural elements in utilitarian belt buckles by reason of *evidence* of the decorative use of the buckles by consumers as ornamentation for parts of the body other than the waist.³ Norris submitted *equivalent evidence* of

³ Professor Melville Nimmer, a leading commentator on the copyright law, has observed: "it may be concluded that conceptual separability exists where there is any substantial likelihood that even if the article had no utilitarian use it would still be marketable to some significant segment of the community simply because of its aesthetic qualities. This was true of the *Kieselstein-Cord* belt buckles and of the *Mazer* sculptured dancers." 1 M. Nimmer, *Nimmer On Copyright*, Section 2.08[B][3], at 2-96.1 (1982).

conceptual separability in this case.⁴ Yet the Eleventh Circuit summarily brushed aside Norris' evidence of conceptual separability by opining as a matter of law that the belt buckles in *Kieselstein-Cord* had been registered as jewelry and that jewelry has traditionally been copyrightable, whereas Norris' Ornamental Trim do not fall within any category of fine or applied art which has traditionally been considered copyrightable. *See*: 696 F.2d at 923-924; Petition App. B, at B-11-B-13. The message of the appellate decision is clear: evidence of separability regarding the Norris Trim was ignored because in the mind of the court the Trim did not fall within an arbitrarily determined class of art called "traditional fine or applied art" — it was summarily excluded because of form only. This is *conscious discrimination* in violation of this Court's mandates in *Bleistein* and *Mazer*, *supra*.

Norris respectfully submits that the conscious discriminatory approach of the Eleventh Circuit in summarily denying copyrightability to articles which "do not fall within any of the categories of fine or applied art which have been traditionally considered copyrightable" sets a *dangerous precedent* for future cases addressing the question of the copyrightability of novel and original three-dimensional art forms. Without review and correction by this Court, the Eleventh Circuit's decision will provide a license for the Copyright Office and the courts to disregard *evidence* relevant to the *statutory* tests governing the copyrightability of such art forms, and will stand as a judicial stamp of approval for conscious and subjective discrimination.

⁴ Thus, Norris' Ornamental Trim is decoratively used to adorn vehicle trunk lids where it obviously performs *no* utilitarian function. See photo in Appendix E, p. E-5 of Norris' Petition.

against any form of art which a particular administrative or judicial officer may not view as being "traditional".⁵

II.

RESPONDENTS HAVE FAILED TO JUSTIFY THE DECISION BELOW, WHICH SUMMARILY AFFIRMS AGENCY DETERMINATIONS MADE WITHOUT EVIDENTIARY BASIS, WITHOUT ANY EXPERTISE BROUGHT TO BEAR AND WITHOUT POSSIBILITY FOR MEANINGFUL JUDICIAL REVIEW.

By improperly deferring to the unsupported determinations of the Copyright Office, the lower courts in this case foreclosed meaningful judicial review under 17 U.S.C. §411(a) of the factual questions relating to the copyrightability of Norris' Ornamental Trim. The record reveals that the Copyright Office at no time advanced *any* technical basis and made no technical findings upon which it based its determination that Norris' Trim are useful articles, or that they lacked conceptually or physically separable aesthetic features eligible for

⁵ The significance and far-reaching implications of the lower court decision are just now becoming the subject of legal commentary. Thus, one commentator has observed in a soon to be published case note: "Copyright protection against commercial piracy is available for only a limited range of three-dimensional products. *Norris Industries v. International Telephone and Telegraph Corporation* illustrates a refusal to extend protection to existing statutory limits. It suggests registration will be denied unless the product falls within a category of useful articles 'traditionally' considered copyrightable, or unless an article's artistic features are clearly physically separable from its utilitarian aspects." (Emphasis added.) K. Dollahite, *Copyrighting Three-Dimensional Objects: Norris Industries v. International Telephone And Telegraph Corporation*, 35 Baylor L. Rev. — (1983) (quoted with permission).

The Solicitor General finally attempts to explain away the lack of technical findings, the absence of analysis, and hence the application of unquestioned deference, by unashamedly suggesting that the copyright statutes do not *require* the Copyright Office to hold an evidentiary hearing to resolve disputed questions of copyrightability (S.G. Br. p. 7). However, it is *precisely* for this reason that *meaningful, judicial review is required* in this case, as well as other future cases reviewing the Copyright Office's actions under 17 U.S.C. § 411(a). Norris is not suggesting that the agency itself was required to provide an evidentiary hearing. However, in its absence, *fundamental fairness* requires that meaningful judicial review regarding questions of material fact relating to the statutory tests of “useful article” and “separability” is required. Without review and correction by this Court, the Eleventh Circuit’s decision will stand as a dangerous and far-reaching precedent allowing for agency determinations denying valuable copyright protection without evidentiary basis, without any expertise brought to bear, and without the possibility for meaningful judicial review under 17 U.S.C. § 411(a).

I.

THE SOLICITOR GENERAL ERRS IN SUGGESTING THAT NORRIS' DISCRIMINATION CLAIM WAS REJECTED IN *ESQUIRE V. RINGER*

The Solicitor General has incorrectly suggested (S.G. Br. p. 6 fn 7) that Norris' claim of discrimination by the appellate court² is similar to a discrimination claim previously addressed and rejected in *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). However, the discrimination issue involved in this Petition is fundamentally different from that of the *Esquire* case. The Solicitor General's claim to the contrary is clearly unsupportable and disingenuous at best.

In *Esquire*, Judge Bazelon distinguished *Bleistein* and *Mazer* as dealing with *conscious bias* against particular forms of art, whereas the Copyright Office's interpretation of particular language in 37 C.F.R. 202.10(c) in the *Esquire* case resulted only in an *unintentional* and inadvertant *burden* on a particular form of art. *See*: 591 F.2d at 805. In contrast, the present Petition does not involve an *unintentional burden* placed upon a particular form of art, but rather involves *conscious discrimination* which would *disqualify* entire classes of "non-traditional" art from copyright protection. The magnitude of this evil was noted by Judge Bazelon in his opinion in *Esquire*:

"As Justice Holmes noted in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 251, 23 S.Ct. 298, 300,

² The Eleventh Circuit's decision improperly and arbitrarily discriminates between *traditional* fine and applied art as being eligible for copyright protection and the chrome plated sculpture of artificial spokes of Norris' Ornamental Trim as being ineligible, in clear violation of this Court's mandates in *Mazer v. Stein*, 347 U.S. 201 (1954), and *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

copyright protection. It was only during *court proceedings* that counsel for the Copyright Office offered belated rationalizations for its actions. In accepting these after-the-fact arguments of counsel the lower courts clearly erred, since courts may not accept appellate counsel's *post-hoc* rationalizations for agency action. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, ___ U.S. ___, 103 S.Ct. 2856, 2870 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

Despite this record, which lacks supporting technical findings and analysis, the Solicitor General attempts to justify the improper use of summary procedure by noting that:

“The Copyright Office has traditionally relied upon its examination of the application and accompanying illustrations or specimens of the work to resolve such questions.” (S.G. Br. p. 7)

The simple response to this claim is that the *only* technical information in the application before the Copyright Office was the unrebutted affidavit evidence indicating that Norris' Trim are not useful articles (Vol. 4, pp. 599-625). The rationale of the Solicitor General would render an agency determination made without evidentiary support or technical findings immune from judicial review, despite technical evidentiary submissions which are contrary to the agency determination.

The only possible ground to support the summary decision below must be on the basis of blind deference. However, the rule of deference does not constitute a blank check for arbitrary action, and the role that Congress has entrusted to the courts under 17 U.S.C. § 411(a) in reviewing actions of the Copyright Office should not be that of a passive conduit. *Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301, 316 (1979). Administrative law principles require that a court should not accord deference to an agency determination which is made or arrived at on the basis of conclusory rationales, rather than

from examination of the facts of each case. *N.L.R.B. v. Yeshiva University*, 444 U.S. 672, 691 (1980). Therefore, before acceding deference to agency action, it must be established that the agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *Motor Vehicle, supra*, 103 S.Ct. at 2866-2867; *Burlington, supra*, 371 U.S. at 168.

In this case, the Copyright Office's determinations amount to erroneous, unsupported, and arbitrary administrative action. What this Court recently said in *Motor Vehicle, supra*, has equal applicability in the present case:

“ ‘There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such . . . practice Expert discretion is the lifeblood of the administrative process, but ‘unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.’ [Citation omitted.]’” 103 S.Ct. at 2869.

Here there was no evidence and no findings which support the agency determination. There was no meaningful technical expertise brought to bear.⁶ To defer to such action compounds agency error by denying any forum in which meaningful review of the facts regarding copyrightability may be had.

⁶ ITT offers a belated justification for deferring to the agency's determination in this case — i.e., it would be *inconvenient* for the agency to take scientific testimony regarding the technical issues relating to copyrightability of three dimensional articles (ITT Br. p. 5 fn 9). ITT's logic would lead to obviously absurd results, disastrous legal consequences, and would create the monster which this Court warned against in *Motor Vehicle, supra*.

III.

CONCLUSION

For the reasons set forth in its Petition, as well as those set forth above, Norris respectfully submits that this Petition involves questions of fundamental importance relating to administrative law principles, as well as the proper legal tests governing copyrightability of three dimensional and other art forms. The grant of the Petition For A Writ of Certiorari is therefore most respectfully urged.

Respectfully submitted,

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